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91-1205

Supreme Court, U.S.
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NO.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

CATHY LAVERGNE,
Petitioner,

VERSUS

CAMERON IRON WORKS,
Respondents

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

1. Did the Appeals Court misinterpret the standard for Directed Verdict in **Anderson v. Liberty** and unconstitutionally deprive plaintiff of her seventh amendment right to trial by jury?

2. Did the Court of Appeals improperly weigh and disregard evidence given at trial in deciding the directed verdict motion, and in doing so improperly make findings of fact that were questions for the jury to decide?

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OPINIONS BELOW

There are no reported opinions in this case. The opinion of the Court of Appeals for the Fifth Circuit is attached hereto as Attachment A. The opinion of the United States District Court for the Eastern District of Louisiana is attached hereto as Attachment B.

I.

GROUNDS FOR JURISDICTION

On 11 September 1991 the United States Court of Appeals for the Fifth Circuit decided to affirm the United States District Court (Eastern District of Louisiana) decision.

On 13 September 1991 notice of Judgment was served.

The Supreme Court Of The United States has jurisdiction to review the Judgment in question under 28 USC 1254.

II.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. **FRCP 50(a): Motion for Directed Verdict and Judgment Notwithstanding the Verdict [Effective until December 1, 1991].**

(a) **Motion for Directed Verdict: When Made; Effect.** A party who moves for directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A

motion for directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds. The order of the court granting a motion for a directed verdict is effective without any asent of the jury.

2. **Seventh Amendment to the Constitution of the United States:**

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

This is a products liability case which arose out of a fatal accident which occurred on 30 October 1986. There was a four day jury trial before the Federal District Court sitting in Lafayette beginning on 5 March 1990. At the close of plaintiff's evidence, the defendant moved for directed verdict. The judge took this motion under advisement until the close of the defendant's evidence. The judge then granted defendant's motion for a directed verdict instead of allowing the case to go to the jury.

The decedent, Glen Lavergne, was employee of BOP Pressure Testers, Inc. On the day of the accident, BOP had been hired to pressure test a wellhead assembly that had already been set up by VETCO in its Broussard yard. BOP sent Glen Lavergne along with a high volume pump to test the assembly. The clamp was an 18-3/4", 10,000 psi Cameron #27 swing bolt clamp. It consisted of two halves with two bolts on each

half. The bolts swung into slots located on the other clamp half and were then secured with nuts that fastened to the end of each bolt. Glen Lavergne arrived at VETCO's Broussard yard and proceeded to set up his testing equipment. Sometime during the pressure test, the clamp halves tore apart, stripping the nuts from the bolts, causing one half of the C-clamp to strike and immediately kill Glen Lavergne.

Decedent had been instructed by VETCO to test the assembly to 1.5 times it working pressure or 15,000 psi. Testing above 10,000 psi was known in the industry.

During the test, decedent noticed leaks in his pump hose and changed the hose out. The proper way to check for leaks is to visually inspect the hose close-up.

Plaintiff Lavergne filed an application for new trial on 31 May 1990, which was denied.

Plaintiff then timely filed an appeal to the 5th Circuit Court of Appeals which was denied on 11 September 1991. Plaintiff now asks the United States Supreme Court to grant Writs of Certiorari. The Court of Appeals had federal jurisdiction over this matter pursuant to 28 USC and F.R.A.P. 4(a).

I. Did the Appeals Court misinterprete the standard for Directed Verdict in **Anderson v. Liberty** and unconstitutionally deprived plaintiff of her seventh amendment right to trial by jury?

The Court of Appeals held that the proper standard is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." **Chiari v. City**, 920 F. 2d 311 (quoting **Anderson v. Liberty**, 106 S. Ct. 2502, 2512). They also stated that "the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." **Anderson**, 2511.

Although this standard is technically correct, it was **misapplied** by the Court of Appeals. They have taken only parts of **Anderson** and in effect misconstrued its meaning. Anderson

also held that:

> If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed [*Anderson v. McCarthy*, 336 U.S. 60, 62, 69 S.Ct. 413, 417, 93 L.Ed. 497 (1949).

Anderson, 2511.

The Supreme Court also stated what a judge must ask himself in deciding whether to grant a directed verdict:

> If the defendant in a run-of-the-mill civil case moves for summary judgment or for a directed verdict based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented.

The court also described the role of the jury as opposed to the judge in deciding directed verdicts and summary judgments:

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict.

Anderson, 2513.

> The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. *Adickes*, 398 U.S., at 158-159, 90 S.Ct., at 1608-1609.

Anderson, 2513.

Clearly there is more to deciding whether or not to grant a directed verdict than "the standard" the Court of Appeals applied. If one follows simply a question of whether the evidence is "so one-sided", there is the danger involved of a judge simply weighing the evidence and **deciding credibility** himself, rather than weighing **only** whether a reasonable jury would have a basis to decide for the non moving party. It is of vital importance that the evidence of the non movent be believed, and all justifiable inference be drawn in his favor. **Anderson**. It is also important to note that a directed verdict or NOV are **extreme devices** which should not be easily granted.

In his dissent in **Anderson**, Justice Brennan

described how the Anderson decision is contradictory, referring to the courts analysis as "deeply flawed" **Anderson**, page 2515. He went on to say that "the Court purports to restate the directed verdict test, but with each repetition, the original understanding is increasingly distorted." A major problem seen by Brennan was that the opinion used "boilerplate" language to the effect that trial courts are not to weigh evidence when deciding directed verdict motions, **but** also language "which could surely be understood as an invitation - if not an instruction - to trial courts to assess and weigh evidence much as a juror would." **Anderson**, 2519. Brennan lists examples of the latter language, which includes the language the Court of Appeals ruled on in the present case:

> "... the inquiry ... [is] whether the evidence presents a *sufficient* disagreement to require submission to a jury or whether *it is so one-sided* that one party must prevail as a matter of law." *Id.*, at 2512 (Emphasis added.)

Anderson, 2512.

Brennan says that he simply cannot square the direction that the judge is not himself to weigh the evidence with the directions that the judge make determinations which Brennan thought "could **only** be preformed by weighing the evidence". **Anderson** dissent, 2519.

Brennan feared that this would lead to serious constitutional questions:

> Moreover, if the judge on motion for summary judgment really is to weigh the evidence, then in my view grave concerns are raised concerning the constitutional right of civil litigants to a jury trial.

Anderson, dissent 2520.

The situation envisioned and feared by Brennan took life in Mrs. Lavergne's suit. The Appeals Court improperly weighed the evidence and reached its own conclusions, in violation of Mrs. Lavergne's Seventh Amendment constitutional right to a jury trial. By taking only one aspect of **Anderson**, the Appeals Court simply weighed the evidence. The Appeals Court did not apply the **Anderson**

standard that "the evidence of the non movant is to be believed, and all justifiable inferences to be drawn in his favor." If they had done so, clearly the Directed Verdict would not have been granted approval. The same court disregarded the standard that "If reasonable minds could differ as to the impact of the evidence ... a verdict should not be directed." **Anderson**. The evidence as discussed in Section II of this application clearly shows that reasonable minds could differ as to the import of the evidence.

By applying the incorrect interpretation of **Anderson**, and improperly approving the directed verdict, the court denied Mrs. Lavergne her **constitutional right** to trial by jury. Mrs. Lavergne lost her husband and the father of her children in this accident, through no fault of her own nor his. He was beheaded because a clamp did not hold. If a jury of her peers, people whom she feels are

like her and can impartially weigh the evidence, tell her that they did not believe Cameron was at fault, Mrs. Lavergne could accept this, as she would have felt that she had the opportunity to be heard. This, however, is **not** the case, because the trial judge improperly took the case from the jury at the close of all evidence. Mrs. Lavergne was deprived of her opportunity to have her peers decide. She now will carry the unsettled issue and grief because she was denied her constitutional right to have her peers answer her question. Not only must she go on with her own life without Glen, but also without her anger resolved. She feels her husband was taken from her through someone else's negligence, and she can never settle the question of whether this is true.

The standard for Directed Verdict has been codified by the recent amendment of F.R.C.P. 50(a) effective 9 December 1991:

Rule 50. Judgment as a Matter of Law in Actions Tried by Jury; Alternative Motion for New Trial; Conditional Rulings [Effective on Dec. 1, 1991. See, also, rule above.]

(a) Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim, counterclaim, cross-claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue.

The judge must decide whether it would be reasonable for a jury to decide for the non-moving party; whether there is a legally sufficient evidentiary basis. He is **not** to decide whether he thinks the non-moving party will win or lose. The standard for Directed Verdict is not whether the plaintiff **proved** his case, but rather whether or not reasonable jurors could differ. The judge may disagree with a jury finding for one party, but he cannot grant Directed Verdict if reasonable jurors could differ based on the evidence presented. By only determining that the evidence is "so one-sided" there is danger that the judge will weigh the evidence

improperly. If reasonable jurors could differ, the judge must allow the jury to decide the case even if he doesn't agree with the jury result, and the fact that he doesn't agree on the basis chosen does **not** empower the judge to change the verdict. Allowing this creates a situation where the judge in a non-bench trial decides the facts, contrary to the seventh amendment.

II. Did the Court Of Appeals improperly weigh and disregarded evidence given at trial in deciding the directed verdict motion, and in doing so improperly make findings of fact that were questions for the jury to decide?

It is improper for a judge to say a jury would be **unreasonable** in believing a witness. **Credibility** is clearly a jury question, as are weighing of the evidence and the drawing of legitimate inferences from the facts.

Anderson at 2513. Whether a thing has been **altered** or **misused** is legitimately inferred from the facts. Whether a **warning** was **adequate** or a user was **sophisticated** are legitimately inferred from the facts. The **cause** of an accident is legitimately inferred from the facts. **Weighing of the evidence is necessary for all these determinations.** This is why the Louisiana Supreme Court in its most recent decision on this subject held that adequacy of **warning, misuse, and causation** are all **factual** questions to be decided by the jury. **Reilly v. Dyanmics**, 571 So. 2d 140. Louisiana has decided that reasonable minds could differ as to these issues and that they were best left to the jury.

The Court of Appeals upheld the trial courts finding that the "10,000 PSI" was a warning which was adequate. Lavergne contended that Cameron was at fault for failure to warn that the clamp may burst at 15,000 psi and for

failure to warn not to replace the original bolts with other than Cameron ones. The trial court found that "the clamp was clearly marked and it was a sufficient warning..." This issue of adequate warning is not for the court to decide. It calls for the weighing of the evidence and facts, and is therefore a question for the jury. On 3 December 1990 in **Reilly v. Dyanmics,** 571 So. 2d 140 the Louisiana Supreme Court held that whether the manufacturer's warnings about the proper use of a particular valve on a pipeline were adequate and whether any omissions in warning contributed to the plaintiff's injuries were questions for the jury. In **Boudreaux v. Eckerd**, 854 F. 2d 85 (5th Cir. 1988) the Fifth Circuit held that it was up to the jury to decide if the manufacturer of eyeglasses had to warn this particular plaintiff of the possible dangers inherent in wearing his glasses while playing volleyball. See also **Bloxom v. Bloxom**, 512 So. 2d 839 (La. 1987);

Vickers v. Chiles, 822 F. 2d 535 (5th Cir. 1987); **Weber v. Caterpiller**, 542 So.2d 544 (La. app. 5th Cir. 1989). Lavergne introduced sufficient evidence for reasonable jurors to decide that the warning was not adequate. Cameron **routinely** ran tests above 10,000 psi on assemblies made up with #27 C-clamps. (Transcript vol. II, p. 70, 75). Cameron **knew** that the #27 C-clamp came apart above 10,000 psi resulting in failure of the nuts and bolts. (Transcript vol. III, p. 9). Cameron **made recommendations** "in house" that it never disseminated to its customers. (Transcript vol. III, p. 14). Cameron did send out a product warning about its clamps but it concerned improperly torqued bolts. It said nothing about possible #27 C-clamp failure above 10,000 psi or about replacing only with specific bolts. (Transcript vol III, pgs. 5-7). In addition, Cameron **already knew** that its #27 C-clamp had failed above 10,000 psi resulting in two deaths in three accidents.

(Transcript vol. II, p. 70, 75). VETCO employees testified that "The customers require that before we send equipment out to a rig which is rated at ten thousand that it be proof-tested to one and a half times working pressure. (Healer's deposition, page 81). There was enough evidence presented at trial for a jury to decide that Cameron should have warned "USE ONLY #27 CAMERON BOLTS".

Lavergne also contended that Cameron's clamp was defective in failing to warn users to not replace with other than #27 Cameron bolts. Louisiana substantive law says that a manufacturer is liable for its product if it is **unreasonably dangerous** in "normal use and in foreseeable misuse", **Chappuis v. Sears**, 358 So. 2d 926 and **Goode v. Miller**, 811 F. 2d 866. The Court of Appeals held that "Lavergne adduced no evidence...that Cameron had knowledge of any improper substitution of bolts prior to decedent's accident or that

Cameron should have foreseen that the bolts originally issued with the clamp would be replaced with smaller bolts with inadequate threading that had been machine altered." (Court of Appeals decision). However the court in deciding this completely disregarded several facts introduced at trial. Lavergne offered sufficient evidence that bolts being replaced were foreseeable. Both courts ignored that such alterations are foreseeable in the oil patch where "down time" can cost hundreds of thousands of dollars and replacement parts are miles away. Cameron had already initiated an "in house" procedure of discarding the nuts and bolts in six to twelve months. (Transcript vol. III p. 14). Several Cameron people testified that one cannot tell which part is correct without a manual. Most importantly, Cameron themselves in 1983 sent out a warning to customers concerning improper torquing of the #27 C-clamp bolts. Cameron recommended that clamps be visually inspected,

and that "damaged studs, nuts, or washers be replaced". (Transcript vol. III p. 7). **Clearly it was foreseeable that the bolts would be replaced,** as Cameron itself recommended replacement. Also, both of the prior accidents that occurred with testing above 10,000 psi were a result of the bolts being stripped. Therefor a jury could logically infer it was foreseeable that bolts would be replaced or altered, and that because a danger existed in the proper bolts, it would surely exist in unmatched other bolts. There is a sufficient evidentiary basis on which a reasonable jury could decide this. Whether "10,000 PSI" was a warning, whether it was adequate, and whether improper bolt replacement should be warned against are **factual questions** for the jury, and not for the court.

The trial court held that there was a **misuse** of the clamp. Recognizing that it is common

for equipment in the oil field to be tested at one and one-half its rated working pressure, the court nevertheless found that VETCO had used the clamp regularly at pressures above its rated working pressure and that this "constituted a serious misuse of the clamp". However, **misuse is a question of fact for the jury to decide.** In **Reilly** the Louisiana Supreme Court stated that whether burial of a pipeline valve without easy access was a "reasonable foreseeable misuse" was a **factual question** to be determined by a jury. See also **Bloxom v. Bloxom**, 512 So.2d 839, (La. 1987); **Chappuis v. Sears**, 358 So.2d 926, (La. 1978); **Weber v. Caterpillar**, 542 So.2d 544, (5th Cir. 1989); **Vickers v. Chiles**, 822 F.2d 535 (5th Cir. 1987. Cameron testified that its use of a #27 C-clamp at above 10,000 psi was **not** a misuse while anyone else's use of the same #27 C-clamp **was** a misuse. Cameron knew that others in the industry tested at 1.5 times the working pressure of the clamp. Therefor a

reasonable jury could conclude that if using the #27 C-clamp above 10,000 psi was indeed a misuse, then it was a **foreseeable misuse**, especially in an industry that regularly tested the C-clamp at 15,000 psi. How many uses equals a misuse is also a jury question. There is clearly a sufficient evidentiary basis for the jury to decide that no misuse occurred or that a misuse was foreseeable. In either event, both questions are for the jury to decide and not the court.

The trial court found VETCO to be a knowledgeable user. Louisiana substantive law holds that a manufacturer does not have to warn a "sophisticated purchaser" or "user" of the dangers of a product about which he should know. What a purchaser "should know" is a **fact question** for the jury to decide. **Fincher v. Surette** 365 So.2d 860 (La. App. 4th Cir. 1979); **Ducote v. Liberty** 451 So.2d 1211 (La. App. 4th Cir. 1984); **Bradco v. Youngstown** 532

F.2d 501 (5th Cir. 1976); **Lebouef v. Goodyear** 623 F.2d 985 (5th Cir. 1980). This finding is wrong for two reasons. First, whether or not VETCO was a sophisticated user is irrelevant as to Mr. Lavergne, as he is the plaintiff and "user". He was an independent contractor and was in no way a sophisticated user of the C-clamp. Mr. Lavergne's job was to apply pressure at whatever amount he was told to in order to test the equipment setup. He was **not** allowed to set up the assembly by VETCO, and did not know the danger of exceeding working pressure or of improper bolt replacement. He had no way of knowing whether proper bolts were on the clamp. The assembly was already complete when Mr. Lavergne arrived. Second, VETCO was found to be a sophisticated user because they also manufactured similar clamps. However, Cameron testified that it did **not** know the "bursting" pressure of its own 10,000 psi #27 C-clamp. (Transcript vol. II p. 87). VETCO could hardly be considered a

"sophisticated user" of the C-clamp and charged with the knowledge that even the manufacturer did not possess. This evidence was enough for the jury to decide that VETCO was not a "sophisticated user", even though this is irrelevant as to Mr. Lavergne.

The Court of Appeals agreed with the trial court that the accident was **caused** by substantial alterations to the bolts, and concluded "that these determinations constitute sufficient grounds to support the directed verdict". (Court of Appeals decision). The Court of Appeals determined that "the record evidence does **not reasonably support** the conclusion that the accident was **caused** by a manufacturing defect in the ten-year-old clamp as opposed to...alterations". In essence, the Court of Appeals **decided** for themselves that **the cause** of the accident was the altered bolts, agreeing with the trial court that "no reasonable jury could find that

the cause of the accident was a failure to warn".

This is improper. Whether or not the Court of Appeals believes the accident resulted from an alteration is irrelevant. The court's duty is not to decide whether the plaintiff proved his case, but only if he introduced sufficient evidence for a reasonable jury to decide for the non-movant party. In deciding this the court must believe the evidence of the non-mover and draw all justifiable inferences in his favor. Otherwise the court must deny the directed verdict. **Anderson** The plaintiff showed sufficient evidence that Cameron **knew** or should have known that the bolts would be replaced, as they themselves recommended replacing bolts. Lavergne has steadily contended that the cause of the accident was failure to warn against using the C-clamp above 10,000 psi without the correct bolts. Cameron has argued at trial that the cause of

the accident was using the clamp above 10,000 psi resulting in stripping of the bolts. These contrary arguments raise **questions of fact** as to **causation**. The Louisiana Supreme Court held in **Reilly** that causation is a jury question. The causation of Glen Lavergne's death should have been decided by the jury.

CONCLUSION

WHEREFORE, it is prayed that this Petition For Writ of Certiorari be granted, and a hearing be had in the Supreme Court of the United States.

Respectfully submitted:

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 90-4558
Summary Calendar

CATHY LAVERGNE,

Plaintiff-Appellant,

versus

CAMERON IRON WORKS, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the
Western District of Louisiana
(CA-87-2595 c/w 88-1089-"L")

(September 11, 1991)

Before KING, GARWOOD, and DUHE', Circuit Judges.[1]

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court

GARWOOD, Circuit Judge:

Plaintiff-appellant Cathy Lavergne (Lavergne) brought this products liability action against defendant-appellee Cameron Iron Works (Cameron) to recover damages for the death of her late husband, Glen Lavergne (decedent), who was killed by the failure of a clamp manufactured by Cameron. Lavergne alleged that Cameron was strictly liable because the accident was caused either by Cameron's failure to warn against using the clamp at pressures exceeding its rated working pressure or by a manufacturing defect in the clamp. The district court granted a directed verdict in favor of Cameron holding that Lavergne had failed to adduce sufficient evidence to enable a reasonable jury to find that a manufacturing defect or a failure to warn caused the accident. We agree and accordingly affirm.

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has determined that this opinion should not be published.

Facts and Proceedings Below

Decedent, an employee of BOP Pressure Testers, Inc., was killed on the premises of Vetco Gray, Inc. (Vetco) on October 30, 1986. Decedent was at Vetco to assist in the pressure testing of a Shell Offshore, Inc. (Shell) wellhead that had been refurbished by Vetco. Vetco employees, in order to seal off the wellhead for the test, had attached a connector to the top of the wellhead. A blind hub was secured to the connector using an 18-3/4", Cameron #27 swing bolt clamp (the clamp). The clamp, which had a rated working pressure of 10,000 psi, consisted of two C-shaped halves that were connected by two bolts on each side. One end of each bolt was attached to the clamp by a pin and the other end of each bolt swung into slots located on the opposite clamp half. The bolts were secured with nuts that fastened to the end of each bolt. The wellhead was placed in front of two metal safety screens owned and erected by Vetco. They were positioned at a ninety

degree angle to each other. The entire test assembly had been constructed before decedent arrived at the Vetco yard.

When decedent arrived, he parked his truck behind the screens. He connected a hose between a high volume pump on his truck and a valve on the blind hub. He had instructions from Vetco to test the wellhead up to 15,000 psi, one and one-half times the rated working pressure of both the clamp and the wellhead. Decedent repeatedly attempted to apply pressure to the wellhead but was unsuccessful due to various equipment problems. On several occasions, he changed the hose between the pump and the wellhead because of leaks.

A Vetco employee, Gerald Elter (Elter), saw decedent standing on the wellhead while it was under pressure of 15,000 psi. Elter immediately told another Vetco employee to release the pressure on the wellhead and he told decedent not to leave the area behind the

safety screens while pressure was on the wellhead. Elter left the area and decedent finished his repairs and continued testing. Decedent subsequently reapplied pressure to the wellhead and the clamp blew off. The nuts were stripped from two of the bolts on one side of the clamp and half of the clamp struck decedent, instantly killing him. Decedent apparently was on top of the wellhead when the accident occurred.

Lavergne, on behalf of herself and decedent's and her minor son, Quinton Lavergne, brought a products liability claim against Vetco, Shell, and Cameron, the manufacturer of the clamp. The district court granted summary judgment in favor of Shell on the ground that it did not control the work of its independent contractor, Vetco. The court granted summary judgment in favor of Vetco on the ground that Vetco was decedent's statutory employer. Lavergne's claim against Cameron went to trial.

Cameron moved for a directed verdict at the close of Lavergne's case. The court took the motion under advisement. At the close of all of the evidence, Cameron again moved for a directed verdict. The court granted the motion and entered judgment for Cameron on May 21, 1990. Following denial of her timely motion for a new trial, Lavergne timely brought this appeal.

Discussion

The subject matter jurisdiction of this case is based on diversity; the case therefore is controlled by Louisiana law. In Louisiana, to recover under a strict products liability theory the plaintiff must prove "(1) that the injury or damage resulted from the condition of the product; (2) that the condition made the product unreasonably dangerous to normal use; and (3) that the condition existed at the time the product left the control of the [defendant] manufacturer or supplier." Bell

v. Jet Wheel Blast, Div. of Ervin Indust., 462 So.2d 166, 168 (La. 1985).

The district court held that Lavergne had failed to make a sufficient showing that Cameron was responsible for the failure of the clamp, determining that the following matters were established by the undisputed evidence or that there was not a sufficient evidence to the contrary on which a verdict for Lavergne could be rationally based.

The district court found that the clamp was clearly marked to show that its rated working pressure was 10,000 psi and that this marking was sufficient to warn any knowledgeable user that the clamp was not to be used regularly above that level of pressure. The court found that Cameron marketed the clamp only to knowledgeable users such as Vetco.

The court found that Vetco misused the clamp in disregard of the warning. The court reasoned that although, under industry custom,

equipment including a clamp may be occasionally tested at pressure levels exceeding its maximum rated level, it is not proper regularly to subject a clamp to pressure in excess of its rated level. The court found that the clamp had been repeatedly subjected to pressures exceeding 10,000 psi and decedent repeatedly subjected the clamp to a pressure of 15,000 psi. The court therefore held that there was no failure to warn because a manufacturer is not required to warn a sophisticated or knowledgeable user of dangers of which they are or should be aware. Bradco Oil & Gas Co. v. Youngstown Sheet & Tube Co., 532 F.2d 501, 504 (5th Cir. 1976) (applying Louisiana law), cert. denied, 97 S.Ct. 1111 (1977).

The court also found that the clamp was not new and had been substantially altered since the date of its manufacture. Cameron manufactured the clamp some time between 1974 and 1976. Three of the bolts on the clamp

were not of the type that originally came with the clamp. Two of the replacement bolts were on the side of the clamp that failed. These two bolts were apparently manufactured by Cameron but they were intended to be used with a different size clamp. They were shorter both in overall length and in the length of their threading than the original bolts.[2] The bolts had been machined down to fit in the clamp used on the wellhead. The threading engagement was considerably weakened and the overall strength of the clamp was materially reduced by the use of the smaller bolts.

A "manufacturer is under no duty 'to make a product that will last forever or will withstand abuse or lack of maintenance' or that is 'foolproof', nor one whose component 'parts do not wear out.'" Scott v. White Trucks, 699 F.2d 714, 717 (5th Cir. 1983) (applying Louisiana Law) (citations omitted).

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[2] The thread length of the replacement bolts was 2.2", compared with the 5.5" length of the threading on the correct bolts.

"[L]apse of time, inadequate 'accounting' for use between manufacture and accident, and alterations and repairs by persons other than the manufacturer will tend to negate the inference of a defect existing at the time of manufacture." Norris v. Bell Helicopter Textron, 495 So.2d 976, 978 (La. Ct. App. 1986).

The district court concluded that no one know how and where the clamp had been used during the minimum of ten years it was in existence. Nor did any one know when or how the clamp was altered. The court found that the clamp was not in the same condition it was in when it first left Cameron. The court found that the age, alterations to the clamp, and its misuse in disregard of the warning caused the accident and that Lavergne had failed to make a contrary showing sufficient for a reasonable jury to impose liability on Cameron.

The proper standard to apply in reviewing

a directed verdict is " 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'"[3]

Chiari v. City of League City, 920 F.2d 311, 314-15 (5th Cir. 1991) (quoting Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2512 (1986)). "[T]he trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." Anderson, 106 S.Ct. at 2511.

We agree with the district court's determinations respecting the role of the alteration to the clamp in causing the accident and we conclude that these determinations constitute sufficient grounds to support the directed verdict. In

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[3] In a diversity case, we apply a federal rather than a state standard for determining whether there is sufficient evidence to create a jury question. Hagan v. EZ Mfg. Co., 674 F.2d 1047, 1051 (5th Cir. 1982).

Louisiana, "a manufacturer can not be held liable for injuries caused by a defective product where the defect was created by an alteration which amounts to an intervening or superseding cause." St. Pierre v. Gabel, 351 So.2d 821, 824 (La. Ct. App. 1977). We determine that the record evidence does not reasonably support the conclusion that the accident was caused by a manufacturing defect in the ten-year-old clamp as opposed to being caused by the substantial alterations made to the clamp after it left Cameron's control.

We have previously stated that "[I]f [a plaintiff] fails to introduce sufficient evidence to enable a jury to find that either a defect in the product or defendant's negligence most probably caused the accident, than the trial court should enter a directed verdict in favor of the defendant." Brown v. Parker-Hannifin Corp., 919 F.2d 308, 312 (5th Cir. 1990). Lavergne adduced no substantially probative evidence that the accident was

caused by anything other than the inadequate threading on the substitute bolts. Lavergne introduced evidence that the same type of clamp that Vetco was using had failed on two prior occasions while being tested at pressures in excess of 10,000 psi by Cameron employees at two different Cameron plants. In one instance, the clamp failed when the threading on the bolts stripped.

The evidence of the two prior failures is not adequate to support Lavergne's speculation that this accident would have occurred even if the correct bolts had been used. The existence of a mere scintilla of evidence in support of the nonmovant's position is insufficient to survive the motion for a directed verdict. Anderson, 106 S.Ct. at 2512. Lavergne presented no evidence that the clamp would have failed due to the excess pressure regardless of the size and threads of the bolts used.

Lavergne also presented no evidence to

dispute Cameron's claim that the replacement bolts caused the accident. Lavergne contends that this claim was an issue of fact properly reserved for jury consideration. However, it was Lavergne's burden to adduce evidence sufficient to support a reasonable finding that the replacement of the bolts by weaker ones with shorter threads was not the cause of the accident or that they were replaced before the clamp left Cameron's control. Lavergne presented no evidence suggesting that the alteration occurred before the clamp left the Cameron plant or that the replaced, altered bolts, which clearly weakened the clamp, were not the cause of its failure.

Lavergne alternatively claims that the use of the wrong bolts with the clamp was a foreseeable misuse for which Cameron was liable. Lavergne adduced no evidence, however, that Cameron had knowledge of any improper substitution of bolts prior to decedent's accident or that Cameron should

have foreseen that the bolts originally issued with the clamp would be replaced with smaller bolts with inadequate threading that had been machine altered. Thus, there was no evidentiary basis on which a jury could have found that the improper use of such replacement bolts was foreseeable.

Conclusion

We find that Lavergne failed to adduce sufficient evidence to support a reasonable jury finding that Cameron was responsible for the accident. Accordingly, the judgment of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

DIANE MYERS	:	CIVIL ACTION
-VS-		NO. 87-2595-L
CAMERON IRON WORKS		JUDGE SCOTT

RULING

This case was tried before us for four days beginning March 5, 1990. At the close of plaintiff's evidence defendant moved for a directed verdict pursuant to F. R. Civ. p. 50(a). The motion was taken under advisement at that time. At the close of defendant's evidence the motion was re-urged and we granted the motion. We now assign reasons for our decision.

This case arose out of a fatal accident which occurred on October 30, 1986 at the

Vetco Gray, Inc. (Vetco) yard at Broussard, Louisiana. Decedent, Glen Lavergne, an employee of BOP Pressure Testers, Inc., was at Vetco on that day to pressure test a Shell Offshore, Inc. wellhead that had been refurbished by Vetco. Vetco employees, to seal off the wellhead for the test, had attached a connector to the wellhead's top. A blind hub was then secured to the connector using an 18-3/4", 10,000 psi Cameron #27 swing bolt clamp. The Cameron clamp, which is the subject of this litigation, consisted of two halves with two bolts on each half. The bolts swung into slots located on the other clamp half and were then secured with nuts that fastened to the end of each bolt. The entire test assembly was put together before decedent arrived at the Vetco yard.

When decedent arrived at Vetco he connected a hose between a high volume pump on his truck and a valve on the blind hub. Decedent had instructions from Vetco to test

the wellhead up to 15,000 psi, which is one and a half times the rated working pressure of both the Cameron clamp and the wellhead. Decedent attempted numerous times to apply pressure but encountered many equipment problems. On several occasions he changed the hose between the pump and the wellhead because of leaks and on one occasion he tightened a fitting.

The wellhead was placed in front of two metal safety screens owned and erected by Vetco and which were positioned at a 90 degree angle. The decedent's truck was parked behind the screens. Several Vetco employee's testified at trial that they were present in the test area when decedent set up the test and began applying pressure to the wellhead. Gerald Elter, a Vetco shop foreman, arrived in the area after the testing had begun and saw decedent standing on the wellhead while it was under pressure of 15,000 psi. Mr. Elter immediately ordered another Vetco employee,

Dennis Ceasar, to release the pressure. Mr. Elter told decedent not to leave the area behind the safety screens while pressure was on the wellhead. Mr. Elter then left the area, decedent finished his repairs and continued testing. After this point no one saw the decedent until after the accident. It is apparent, however, that decedent reapplied pressure to the wellhead and, in absolute violation of Elter's warning, was in the immediate area of the wellhead when the nuts stripped from the two bolts located on one of the clamp halves and the clamp halves flew apart. Decedent was apparently struck by one half of the clamp and died instantly.

Plaintiff, Cathy Lavergne sued Cameron Iron Works and others on her own behalf and on the behalf of her minor son Quinton Lavergne. At the time of trial the only remaining claim was a products liability claim against Cameron Iron Works. Specifically plaintiff claimed that the Cameron Iron Works clamp did not

include a sufficient warning of the dangers of using the clamp at pressures higher than its rated working pressure.

In Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), the Supreme Court repeated the standard to be used by the District Court when determining whether there is sufficient evidence to submit a case to the jury in connection with a Motion for Directed Verdict:

> The trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict...If reasonable minds could differ as to the import of the evidence however, a verdict should not be directed. ...As the Court long ago said in Improvement Co. v. Munson, 14 Wall 442, 448, 20 L.Ed. 867 (1872), and has several times repeated:
>
> > Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in

> favor of that party. Formerly it was held that if what is called a scintilla of evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." (footnotes omitted).

Id., at 250-251 (citations omitted). See also Boeing Co. v. Shipman, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc).

In this case plaintiff's primary allegation was that Cameron Iron Works manufactured a defective clamp in that it failed to warn users of the potential dangers resulting from using the clamp above its rated working pressure. See Chappuis v. Sears Roebuck & Co., 358 So.2d 926 (La. 1978).

To recover under a strict products liability theory the plaintiff must prove "(1) that the injury or damage resulted from the

condition of the product; (2) that the condition made the product unreasonably dangerous to normal use; and (3) that the condition existed at the time the product left the control of the manufacturer or supplier." Bell v. Jet Wheel Blast, 462 So.2d 166, 168 (La. 1985). Failure to warn of potential dangers can make a product unreasonably dangerous to normal use. Chappuis, supra.

First, we do not believe that defendant Cameron Iron Works failed to warn of potential dangers resulting from using the clamp regularly at pressures above its rated working pressure. The clamp was clearly marked that its rated working pressure was 10,000 psi. This was a warning and it was a sufficient warning took any knowledgeable user that the clamp was to be used at or below that pressure.

Further, Cameron only marked the clamp to knowledgeable users; this is not a product that is available to users outside the oil and

gas industry. Vetco was clearly a knowledgeable user. In fact, Vetco was Cameron's main competitor in the oilfield clamp business. A more explicit warning was not necessary. No reasonable jury could find that the cause of this accident was a failure to warn. Vetco, who set up the test assembly and decided on the amount of pressure to be applied, already knew or should have known of the dangers of using a clamp, such as this one, regularly at a rate of one and one half times its rated working pressure. A manufacturer is not required to warn a sophisticated or knowledgeable user of danger of which they are or should be aware. Scott v. White Trucks, 699 F.2d 714 (5th Cir. 1983); Bradco Oil & Gas Co. v. Youngstown Sheet & Tube Co., 532 F.2d 501 (5th Cir. 1976). Thus, we find that there was no failure to warn by Cameron.

Similarly, we find that the clamp was being misused. A manufacturer is entitled to

assume that its product will not be put to extraordinary uses or unreasonably misused. Christofferson v. Haliburton Co., 617 F.2d 403 (5th Cir. 1980). Although, it is common in the oilfield to test equipment at one and one half times its rated working pressure, it is not proper or reasonably expected for equipment to be used regularly at pressures above its rated working pressure. Testimony was offered that the clamp had been used in tests of 15,000 psi repeatedly since it had been at Vetco's Broussard yard. However, on each occasion the clamp was not the subject of the test, it was merely part of the test assembly. This constituted a serious misuse of the clamp. In designing tests to 15,000 psi, a clamp with a rated working pressure of 15,000 psi could and should have been used.

Third, we find that the clamp had been substantially altered since the date of its manufacture. The clamp was not new. The only evidence we have to determine when it was

manufactured is from its markings. Each clamp half was marked with a small inspectors stamp which indicated that it was manufactured at Cameron's Oklahoma City plant. The Oklahoma City plant only manufactured the 10,000 psi #27 clamp from 1974 through 1976. Examination of the clamp also revealed that three of the bolts on the clamp were not the type bolts the clamp came with originally. The two bolts which stripped out were apparently Cameron bolts for a different size Cameron clamp. These bolts had been "turned down" or machined to fit in this clamp. These bolts were shorter than the bolts the clamp was designed to use. The result from using shorter bolts was that thread engagement was considerably lessened and the strength of the connection and ultimately the clamp was greatly reduced.

A "manufacturer is under no duty ' to make a product that will last forever or will withstand abuse or lack of maintenance' or that is 'foolproof', nor one whose component

'parts do not wear o ut'". Scott at 717 (citations omitted). "Lapse of time, inadequate 'accounting' for use between manufacture and accident, and alterations and repairs by persons other than the manufacturer will tend to negate the inference of defect existing at the time of the manufacture." Norris v. Bell Helicopter Textron, 495 So. 2d 978 (La. App. 3d Cir. 1986). In this case no one knew what kind of use the clamp had been subjected to, nor where it had been used prior to its arrival at the Broussard facility. Additionally, no one knew when or how the altered bolts came to be on the clamp. These changes as well as the repeated misuse of the product substantially reduced the safety factors and efficiency of the clamp as it was manufactured and were factors in the accident. The condition of the clamp at the time of the accident was not the same as it was when it left the manufacturer's control.

We find that plaintiff failed to make a showing concerning essential elements of her case and that there is no genuine issue as to material fact upon which a jury could properly proceed to find a verdict for the plaintiff. Defendant Cameron therefore is entitled to a directed verdict as a matter of law and judgment will be entered in Cameron's favor and against plaintiff Lavergne, dismissing plaintiff's claims with prejudice.

DONE AND SIGNED at Alexandria, Louisiana this 2nd day of May 1990.

Supreme Court, U.S.
FILED
MAR 2 1992
OFFICE OF THE CLERK

NO. 91-1205

In the Supreme Court of the United States

OCTOBER TERM, 1991

CATHY LAVERGNE,
Petitioner,

VERSUS

CAMERON IRON WORKS, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the appellate court properly affirmed a directed verdict entered in favor of the defendant manufacturer, pursuant to the guidelines set out by this Court in *Anderson v. Liberty Lobby, Inc.*, where plaintiff failed to adduce any evidence, substantial or otherwise, in support of the essential elements of her product liability claim.

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The opinions of the United States District Court and the United States Court of Appeals for the Fifth Circuit were not officially reported. Both opinions are reprinted in the appendix.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

NO. 91-1205

CATHY LAVERGNE,
Petitioner,

VERSUS

CAMERON IRON WORKS, INC.,
Respondents.

BRIEF OF RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

The facts of the case are stated fully in the decisions of the district court and appellate court, both of which appear in the appendix.[1]

SUMMARY OF ARGUMENT

The appellate court strictly adhered to the guidelines set forth in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

[1] The interested parties consist of Cathy Lavergne; her minor son, Quinton Lavergne; Cameron Iron Works, Inc.; and Cooper Industries, Inc. Cameron was purchased by Cooper Industries following the accident. The merger of the two companies was finalized on November 29, 1989.

106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) in affirming the directed verdict granted by the district court. Although Lavergne insists that factual questions were presented for a jury to decide, both the district and appellate courts concluded that Lavergne had adduced no evidence to create a factual dispute eligible for jury submission. Nor did the directed verdict contravene Lavergne's Seventh Amendment right to a jury trial. The Seventh Amendment has never been interpreted in the manner advocated by Lavergne. To the contrary, this Court long ago held that a motion for directed verdict is not inconsistent with the Seventh Amendment. *Galloway v. United States*, 319 U.S. 372, 63 S.Ct. 1077, 87 L.Ed. 1458 (1943); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979). Because Lavergne's petition fails to raise any issue worthy of review by this Court, it should be denied.

ARGUMENT

The appellate court affirmed the trial court's finding that Lavergne had adduced "no substantial probative evidence that the accident was caused by anything other than the inadequate threading on the substitute bolts."[2] Furthermore, the appellate court held that Lavergne presented *no evidence* that the clamp would have failed due to the excess pressure regardless of the size and threads of the bolts used; *no evidence* suggesting that the alteration occurred before the clamp left the Cameron plant; *no evidence* that Cameron had knowledge of any improper substitution of bolts prior to the accident; and *no evidence* that the altered bolts, which clearly weakened the clamp, were not the cause of its failure.[3]

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[2] Fifth Circuit's opinion, p. A-7.

[3] Fifth Circuit's opinion, p. A-7 through A-8.

Under Federal Rule of Civil Procedure 50(a), a trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. *Anderson*, 477 U.S. at 250; 106 S.Ct. at 2511 (1986). The focus of the inquiry is: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Id.*, 477 U.S. at 251-52, 106 S.Ct. at 2512. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. *Id.*, 477 U.S. at 252, 106 S.Ct. at 2512.[4] Based on the absence of controvertible evidence presented by Lavergne, the appellate court properly sustained the directed verdict.

Lavergne, however, contends that the appellate court misinterpreted *Anderson* and improperly weighed the evidence.[5] These contentions are meritless. In order for there to be a weighing of evidence, one party must present facts that dispute those adduced by the opponent. Here,

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[4] That a scintilla of evidence is not enough is especially true in cases where the party against whom a directed verdict is entered had the burden of proof. *Liberty Leather Corp. v. Callum*, 653 F.2d 694 (2nd Cir. 1981); *Owens v. International Paper Co.*, 528 F.2d 606 (5th Cir. 1976), *reh. den.* 532 F.2d 186.

[5] A party against whom a verdict is directed has the onus of demonstrating the existence of a conflict in the evidence, or inferences to be drawn therefrom, sufficient to justify submission of the question to the jury. *Richardson v. City of Indianapolis*, 658 F.2d 494 (7th Cir. 1981), *cert. den.* 455 U.S. 945, 102 S.Ct. 1442, 71 L.Ed.2d 657. Furthermore, in order to claim the benefit of favorable inferences, the party against whom the verdict is directed must present "substantial evidence" in support of its claim, i.e., evidence which a reasonable mind might accept as adequate to support a conclusion. *Kaplan v. Burroughs Corp.*, 611 F.2d 286 (9th Cir. 1979), *cert. den.* 447 U.S. 924, 100 S.Ct. 3016, 65 L.Ed.2d 1116.

two courts found on the critical issues of manufactured condition, subsequent alteration, causation, misuse, sophisticated user and failure to warn, that Lavergne offered *no evidence* to contradict the evidence advanced by Cameron.

Manufactured Condition - Lavergne introduced no evidence to establish what the condition of the clamp was when it left Cameron's control, or that the clamp's manufactured condition posed an unreasonable risk of danger. The only evidence adduced in this regard was from Cameron, which established that the clamp's bolts had been materially altered after it was sold.[6]

Subsequent Alterations - Only Cameron introduced evidence demonstrating the extent and effect of the alterations. Cameron showed that three out of the four bolts were replaced with bolts that were not of the type that originally came with the clamp, that the bolts probably came from a different size Cameron clamp, and that they had to be machined to fit this clamp. Cameron also showed that the altered bolts were shorter than the bolts designed to be used with the clamp, and that their thread length was only 2.2″ compared to the 5.5″ thread length of a correct bolt. Because of this, the bolts could not be completely inserted through the nuts, thereby allowing less than full thread engagement. None of this evidence was controverted by Lavergne.

Causation - Lavergne offered no evidence to dispute the effect the altered bolts had on the clamp's ability to

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[6] Under Louisiana law, to recover from a manufacturer in strict liability for a defective product, the plaintiff must prove that the defective condition existed at the time the product left the manufacturer's control as well as that the condition made the product unreasonably dangerous to normal use. *Beck v. Somerset Technologies, Inc.*, 882 F.2d 993, 996 (5th Cir. 1989).

perform, or that the accident would not have occurred if the clamp had been outfitted with the correct bolts. The reduction in thread engagement of almost 1″, or 32%, subjected the threads that were engaged to greater stress and substantially weakened the connection to the point that the threads of the two altered bolts on the same side of the clamp gave way. In contrast, the nuts and bolts on the opposite side of the clamp, which had one correct bolt and one altered bolt, sustained no damage. The testimony was uncontradicted that the altered bolts caused the clamp to come apart, and had the clamp been equipped with the correct bolts, it would not have separated even at 15,000 psi.

Misuse - Because the wellhead had a rated working pressure of 10,000 psi, industry standards required that it be tested at 15,000 psi. Since the clamp and the other equipment used for the test were not the object of the test, but only instruments to perform it, all should have had a minimum rated working pressure of 15,000 psi. Nevertheless, Vetco chose to use the clamp, because the recommended equipment listed in Vetco's specifications was unavailable, and the clamp was the only fastening mechanism at Vetco's facility that would fit the other equipment needed to seal the wellhead. Furthermore, Vetco's use of the clamp in this fashion was not an isolated occurrence. Vetco personnel testified that for a year prior to the accident, the clamp was subjected to repeated pressurizations at 15,000 psi. Once again, Lavergne adduced no evidence to controvert these facts.

Sophisticated User - Lavergne never rebutted evidence adduced by Cameron that Vetco and Cameron were the oil industry's "two big manufacturers" of high pressure clamps. Cameron further showed that Vetco's knowledge of clamps and their capabilities was extensive. Cameron adduced evidence that Vetco maintained an in-

house engineeering staff, whose expertise was "as sophisticated" as Cameron's, to design its own line of clamps; that Vetco listed the same information regarding size and rated working pressure on the clamps it made; and that the Vetco specifications for wellhead testing, prepared by its engineers, contained extensive information on the Cameron clamp in question, including its dimensions and its rated working pressure of 10,000 psi.

Failure to Warn - To defeat this issue, Cameron showed that the 10,000 psi limitation, cast into the top of the clamp halves, conveyed simple and straightforward information regarding the clamp's pressure limitation. The warning traveled with the clamp, was not subject to removal or obliteration, and was easy to observe. Furthermore, it conformed to the universal standard used by oil industry manufacturers to designate an equipment's maximum working pressure. No other designation but 10,000 psi was placed on the clamp to avoid confusion, or the possible supposition that the clamp could be safely used on a routine basis at a pressure level greater than 10,000 psi.[7] Most important of all, the Vetco witnesses who worked on the test testified that they knew the clamp was rated at

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[7] The cases cited by Lavergne in an attempt to establish a failure to warn claim are inapposite. In all but one, no warning was provided by the manufacturer, whereas here there was a clear and concise warning; in the one exception, the user never read the warning that was given. *Boudreaux v. Jack Eckerd Corp.*, 854 F.2d 85 (5th Cir. 1988) (no warning that eyeglasses could shatter); *Vickers v. Chiles Drilling Co.*, 822 F.2d 535 (5th Cir. 1987) (no notice on compressor advising of the presence of an internal ladder); *Reilly v. Dynamic Exploration, Inc.*, 571 So.2d 140 (La. 1990) (no warning against burying valve); *Weber v. Caterpillar Machinery Corp.*, 542 So.2d 544 (La. App. 5th 1989), *writ den.* 548 So.2d 332 (no warning against removal of doors on forklift); *Bloxom v. Bloxom*, 512 So.2d 839 (La. 1987) (although warning given of catalytic converter's incendiary propensities, when car parked over combustible materials, owner did not read owner's manual containing warning and manufacturer was exonerated).

10,000 psi and that it was unsafe to ignore the limitation. Although Lavergne contends Cameron should have warned against using the clamp at 15,000 psi, this would have been superfluous in light of the lower 10,000 psi limitation. Likewise, Lavergne's argument that Cameron knew the bolts would be replaced misses the mark. Replacing the original bolts with the correct bolts was not the issue, but whether Cameron could have foreseen that bolts apparently salvaged from another clamp and drastically altered would be used in this manner. On the point, Lavergne adduced no evidence that Cameron had knowledge of an improper substitution of bolts or that it was foreseeable that smaller bolts from another clamp would be machined to fit this clamp.

Due to Lavergne's failure to dispute each of these issues with any probative evidence, there was no disagreement to submit to the jury and the trial court, as required, directed a verdict in Cameron's favor, which the appellate court under *Anderson* correctly affirmed. Furthermore, the affirmance is in accord with decisions rendered by this and other circuits. In *Goldsmith v. Olon Andrews, Inc.*, 941 F.2d 423 (6th Cir. 1991), a directed verdict in favor of a helicopter manufacturer in a wrongful death action was affirmed, where the helicopter which crashed was built from spare parts, and there was insufficient evidence for a jury to hold the manufacturer responsible for placing the product in commerce. Similarly, in *Johns v. Jarrard*, 927 F.2d 551 (11th Cir. 1991), the court affirmed a directed verdict in a medical malpractice case where plaintiffs failed to create a jury question on the issue of causation. And, in *Brown v. Parker-Hannifin Corp.*, 919 F.2d 308 (5th Cir. 1990), a products liability action against a coupling manufacturer was dismissed on directed verdict, because the injured plaintiff failed to present sufficient evidence to establish that the coupling was defective or that the

manufacturer's failure to label the coupling with its pressure rating was the most probable cause of its failure.

CONCLUSION

Lavergne seeks to relitigate in this court factual assertions not supported by the trial record, that have been carefully reviewed by the appellate court and rejected. Beyond this, Lavergne's petition fails to raise any "special and important" reason that could mandate this Court's review of this matter, nor does the petition demonstrate that the appellate court's decision is in conflict with another appellate court on the same matter, or has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.[8] Accordingly, Lavergne's petition should be denied.

Respectfully submitted,

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[8] Rule 10 of Rules of the Supreme Court of the United States.

CERTIFICATE OF SERVICE

I hereby certify that this brief has been served on petitioner through her counsel of record, Arthur Cobb, Esq., Cobb & Cobb, 300 Louisiana Avenue, Suite 101, Baton Rouge, Louisiana 70802-5803, by placing same in the United States mail, postage prepaid and properly addressed, this 2nd day of March, 1992.

S/HOWARD L. MURPHY

HOWARD L. MURPHY

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-4558
Summary Calendar

CATHY LAVERGNE,

Plaintiff-Appellant,

versus

CAMERON IRON WORKS, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the
Western District of Louisiana
(CA-87-2595 c/w 88-1089-"L")

(September 11, 1991)

Before KING, GARWOOD, and DUHE', Circuit Judges.[1]

GARWOOD, Circuit Judge:

Plaintiff-appellant Cathy Lavergne (Lavergne)

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

brought this products liability action against defendant-appellee Cameron Iron Works (Cameron) to recover damages for the death of her late husband, Glen Lavergne (decedent), who was killed by the failure of a clamp manufactured by Cameron. Lavergne alleged that Cameron was strictly liable because the accident was caused either by Cameron's failure to warn against using the clamp at pressures exceeding its rated working pressure or by a manufacturing defect in the clamp. The district court granted a directed verdict in favor of Cameron holding that Lavergne had failed to adduce sufficient evidence to enable a reasonable jury to find that a manufacturing defect or a failure to warn caused the accident. We agree and accordingly affirm.

Facts and Proceedings Below

Decedent, an employee of BOP Pressure Testers, Inc., was killed on the premises of Vetco Gray, Inc. (Vetco) on October 30, 1986. Decedent was at Vetco to assist in the pressure testing of a Shell Offshore, Inc. (Shell) wellhead that had been refurbished by Vetco. Vetco employees, in order to seal off the wellhead for the test, had attached a connector to the top of the wellhead. A blind hub was secured to the connector using an 18-3/4", Cameron #27 swing bolt clamp (the clamp). The clamp, which had a rated working pressure of 10,000 psi, consisted of two C-shaped halves that were connected by two bolts on each side. One end of each bolt was attached to the clamp by a pin and the other end of each bolt swung into slots located on the opposite clamp half. The bolts were secured with nuts that fastened to the end of each bolt. The wellhead was placed in front of two metal safety screens owned and erected by Vetco. They were positioned at a ninety degree angle to each other. The entire test assembly had been constructed before decedent arrived at the Vetco yard.

When decedent arrived, he parked his truck behind the screens. He connected a hose between a high volume pump on his truck and a valve on the blind hub. He had instructions from Vetco to test the wellhead up to 15,000 psi, one and one-half times the rated working pressure of both the clamp and the wellhead. Decedent repeatedly attempted to apply pressure to the wellhead but was unsuccessful due to various equipment problems. On several occasions, he changed the hose between the pump and the wellhead because of leaks.

A Vetco employee, Gerald Elter (Elter), saw decedent standing on the wellhead while it was under pressure of 15,000 psi. Elter immediately told another Vetco employee to release the pressure on the wellhead and he told decedent not to leave the area behind the safety screens while pressure was on the wellhead. Elter left the area and decedent finished his repairs and continued testing. Decedent subsequently reapplied pressure to the wellhead and the clamp blew off. The nuts were stripped from two of the bolts on one side of the clamp and half of the clamp struck decedent, instantly killing him. Decedent apparently was on top of the wellhead when the accident occurred.

Lavergne, on behalf of herself and decedent's and her minor son, Quinton Lavergne, brought a products liability claim against Vetco, Shell, and Cameron, the manufacturer of the clamp. The district court granted summary judgment in favor of Shell on the ground that it did not control the work of its independent contractor, Vetco. The court granted summary judgment in favor of Vetco on the ground that Vetco was decedent's statutory employer. Lavergne's claim against Cameron went to trial.

Cameron moved for a directed verdict at the close of Lavergne's case. The court took the motion under advise-

ment. At the close of all of the evidence, Cameron again moved for a directed verdict. The court granted the motion and entered judgment for Cameron on May 21, 1990. Following denial of her timely motion for a new trial, Lavergne timely brought this appeal.

Discussion

The subject matter jurisdiction of this case is based on diversity; the case therefore is controlled by Louisiana law. In Louisiana, to recover under a strict products liability theory the plaintiff must prove "(1) that the injury or damage resulted from the condition of the product; (2) that the condition made the product unreasonably dangerous to normal use; and (3) that the condition existed at the time the product left the control of the [defendant] manufacturer or supplier." *Bell v. Jet Wheel Blast, Div. of Ervin Indust.*, 462 So.2d 166, 168 (La. 1985).

The district court held that Lavergne had failed to make a sufficient showing that Cameron was responsible for the failure of the clamp, determining that the following matters were established by the undisputed evidence or that there was not sufficient evidence to the contrary on which a verdict for Lavergne could be rationally based.

The district court found that the clamp was clearly marked to show that its rated working pressure was 10,000 psi and that this marking was sufficient to warn any knowledgeable user that the clamp was not to be used regularly above that level of pressure. The court found that Cameron marketed the clamp only to knowledgeable users such as Vetco.

The court found that Vetco misused the clamp in disregard of the warning. The court reasoned that

although, under industry custom, equipment including a clamp may be occasionally *tested* at pressure levels exceeding its maximum rated level, it is not proper *regularly* to subject a clamp to pressure in excess of its rated level. The court found that the clamp had been repeatedly subjected to pressures exceeding 10,000 psi and decedent repeatedly subjected the clamp to a pressure of 15,000 psi. The court therefore held that there was no failure to warn because a manufacturer is not required to warn a sophisticated or knowledgeable user of dangers of which they are or should be aware. *Bradco Oil & Gas Co. v. Youngstown Sheet & Tube Co.*, 532 F.2d 501, 504 (5th Cir. 1976) (applying Louisiana law), *cert. denied*, 97 S.Ct. 1111 (1977).

The court also found that the clamp was not new and had been substantially altered since the date of its manufacture. Cameron manufactured the clamp some time between 1974 and 1976. Three of the bolts on the clamp were not of the type that originally came with the clamp that failed. These two bolts were apparently manufactured by Cameron but they were intended to be used with a different size clamp. They were shorter both in overall length and in the length of their threading than the original bolts.[2] The bolts had been machined down to fit in the clamp used on the wellhead. The threading engagement was considerably weakened and the overall strength of the clamp was materially reduced by the use of the smaller bolts.

A "manufacturer is under no duty 'to make a product that will last forever or will withstand abuse or lack of maintenance' or that is 'foolproof,' nor one whose component 'parts do not wear out.' " *Scott v. White Trucks*, 699

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[2] The thread length of the replacement bolts was 2.2", compared with the 5.5" length of the threading on the correct bolts.

F.2d 714, 717 (5th Cir. 1983) (applying Louisiana law) (citations omitted). "[L]apse of time, inadequate 'accounting' for use between manufacture and accident, and alterations and repairs by persons other than the manufacturer will tend to negate the inference of a defect existing at the time of manufacture." *Norris v. Bell Helicopter Textron*, 495 So.2d 976, 978 (La. Ct. App. 1986).

The district court concluded that no one knew how and where the clamp had been used during the minimum of ten years it was in existence. Nor did any one know when or how the clamp was altered. The court found that the clamp was not in the same condition it was in when it first left Cameron. The court found that the age, alterations to the clamp, and its misuse in disregard of the warning caused the accident and that Lavergne had failed to make a contrary showing sufficient for a reasonable jury to impose liability on Cameron.

The proper standard to apply in reviewing a directed verdict is " 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.' "[3] *Chiari v. City of League City*, 920 F.2d 311, 314-15 (5th Cir. 1991) (quoting *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2512 (1986)). "[T]he trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson*, 106 S.Ct. at 2511.

We agree with the district court's determinations respecting the role of the alteration to the clamp in causing the accident and we conclude that these determinations

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[3] In a diversity case, we apply a federal rather than a state standard for determining whether there is sufficient evidence to create a jury question. *Hagan v. EZ Mfg. Co.*, 674 F.2d 1047, 1051 (5th Cir. 1982).

constitute sufficient grounds to support the directed verdict. In Louisiana, "a manufacturer can not be held liable for injuries caused by a defective product where the defect was created by an alteration which amounts to an intervening or superseding cause." *St. Pierre v. Gabel*, 351 So.2d 821, 824 (La. Ct. App. 1977). We determine that the record evidence does not reasonably support the conclusion that the accident was caused by a manufacturing defect in the ten-year-old clamp as opposed to being caused by the substantial alterations made to the clamp after it left Cameron's control.

We have previously stated that "[i]f [a plaintiff] fails to introduce sufficient evidence to enable a jury to find that either a defect in the product or defendant's negligence most probably caused the accident, then the trial court should enter a directed verdict in favor of the defendant." *Brown v. Parker-Hannifin Corp.*, 919 F.2d 308, 312 (5th Cir. 1990). Lavergne adduced no substantially probative evidence that the accident was caused by anything other than the inadequate threading on the substitute bolts. Lavergne introduced evidence that the same type of clamp that Vetco was using had failed on two prior occasions while being tested at pressures in excess of 10,000 psi by Cameron employees at two different Cameron plants. In one instance, the clamp failed when the threading on the bolts stripped.

The evidence of the two prior failures is not adequate to support Lavergne's speculation that this accident would have occurred even if the correct bolts had been used. The existence of a mere scintilla of evidence in support of the nonmovant's position is insufficient to survive the motion for a directed verdict. *Anderson*, 106 S.Ct. at 2512. Lavergne presented no evidence that the clamp would have failed due to the excess pressure regardless of the size and

threads of the bolts used.

Lavergne also presented no evidence to dispute Cameron's claim that the replacement bolts caused the accident. Lavergne contends that this claim was an issue of fact properly reserved for jury consideration. However, it was Lavergne's burden to adduce evidence sufficient to support a reasonable finding that the replacement of the bolts by weaker ones with shorter threads was not the cause of the accident or that they were replaced before the clamp left Cameron's control. Lavergne presented no evidence suggesting that the alteration occurred before the clamp left the Cameron plant or that the replaced, altered bolts, which clearly weakened the clamp, were not the cause of its failure.

Lavergne alternatively claims that the use of the wrong bolts with the clamp was foreseeable misuse for which Cameron was liable. Lavergne adduced no evidence, however, that Cameron had knowledge of any improper substitution of bolts prior to decedent's accident or that Cameron should have foreseen that the bolts originally issued with the clamp would be replaced with smaller bolts with inadequate threading that had been machine altered. Thus, there was no evidentiary basis on which a jury could have found that the improper use of such replacement bolts was foreseeable.

Conclusion

We find that Lavergne failed to adduce sufficient evidence to support a reasonable jury finding that Cameron was responsible for the accident. Accordingly, the judgment of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

FILED
MAY 02 1990

DIANNE MYERS	:	CIVIL ACTION
-vs-	:	NO. 87-2595-L
CAMERON IRON WORKS	:	JUDGE SCOTT

R U L I N G

This case was tried before us for four days beginning March 5, 1990. At the close of plaintiff's evidence defendant moved for a directed verdict pursuant to F. R. Civ. P. 50(a). The motion was taken under advisement at that time. At the close of defendant's evidence the motion was re-urged and we granted the motion. We now assign reasons for our decision.

This case arose out of a fatal accident which occurred on October 30, 1986 at the Vetco Gray, Inc. (Vetco) yard at Broussard, Louisiana. Decedent, Glen Lavergne, an employee of BOP Pressure Testers, Inc., was at Vetco on that day to pressure test a Shell Offshore, Inc. wellhead that had been refurbished by Vetco. Vetco employees, to seal off the wellhead for the test, had attached a connector

to the wellhead's top. A blind hub was then secured to the connector using an 18-3/4", 10,000 psi Cameron #27 swing bolt clamp. The Cameron clamp, which is the subject of this litigation, consisted of two halves with two bolts on each half. The bolts swung into slots located on the other clamp half and were then secured with nuts that fastened to the end of each bolt. The entire test assembly was put together before decedent arrived at the Vetco yard.

When decedent arrived at Vetco he connected a hose between a high volume pump on his truck and a valve on the blind hub. Decedent had instructions from Vetco to test the wellhead up to 15,000 psi, which is one and a half times the rated working pressure of both the Cameron clamp and the wellhead. Decedent attempted numerous times to apply pressure but encountered many equipment problems. On several occasions he changed the hose between the pump and the wellhead because of leaks and on one occasion he tightened a fitting.

The wellhead was placed in front of two metal safety screens owned and erected by Vetco and which were positioned at a 90 degree angle. The decedent's truck was parked behind the screens. Several Vetco employees testified at trial that they were present in the test area when decedent set up the test and began applying pressure to the wellhead. Gerald Elter, a Vetco shop foreman, arrived in the area after the testing had begun and saw decedent standing on the wellhead while it was under pressure of 15,000 psi. Mr. Elter immediately ordered another Vetco employee, Dennis Ceasar, to release the pressure. Mr. Elter told decedent not to leave the area behind the safety screens while pressure was on the wellhead. Mr. Elter then left the area, decedent finished his repairs and continued testing. After this point no one saw the decedent until after the accident. It is apparent, however, that decedent reap-

plied pressure to the wellhead and, in absolute violation of Elter's warning, was in the immediate area of the wellhead when the nuts stripped from the two bolts located on one of the clamp halves and the clamp halves flew apart. Decedent was apparently struck by one half of the clamp and died instantly.

Plaintiff, Cathy Lavergne sued Cameron Iron Works and others on her own behalf and on the behalf of her minor son Quinton Lavergne. At the time of trial the only remaining claim was a products liability claim against Cameron Iron Works. Specifically plaintiff claimed that the Cameron Iron Works clamp did not include a sufficient warning of the dangers of using the clamp at pressures higher than its rated working pressure.

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), the Supreme Court repeated the standard to be used by the District Court when determining whether there is sufficient evidence to submit a case to the jury in connection with a Motion for Directed Verdict:

> The trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. ... If reasonable minds could differ as to the import of the evidence however, a verdict should not be directed. ...As the Court long ago said in *Improvement Co. v. Munson*, 14 Wall 442, 448, 20 L.Ed. 867 (1872), and has several times repeated:
>
> > Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would

> warrant the jury in finding a verdict in favor of that party. Formerly it was held that if it was held what is called a *scintilla* of evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." (footnotes omitted).

Id., at 250-251 (citations omitted). *See also Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969) (*en banc*).

In this case plaintiff's primary allegation was that Cameron Iron Works manufactured a defective clamp in that it failed to warn users of the potential dangers resulting from using the clamp above its rated working pressure. *See Chappuis v. Sears Roebuck & Co.*, 358 So.2d 926 (La. 1978). We disagree.

To recover under a strict products liability theory the plaintiff must prove "(1) that the injury or damage resulted from the condition of the product; (2) that the condition made the product unreasonably dangerous to normal use; and (3) that the condition existed at the time the product left the control of the manufacturer or supplier." *Bell v. Jet Wheel Blast*, 462 So.2d 166, 168 (La. 1985). Failure to warn of potential dangers can make a product unreasonably dangerous to normal use. *Chappuis, supra.*

First, we do not believe that defendant Cameron Iron Works failed to warn of potential dangers resulting from using the clamp regularly at pressures above its rated working pressure. The clamp was clearly marked that its rated working pressure was 10,000 psi. This was a warning and it was a sufficient warning to any knowledgeable user

that the clamp was to be used at or below that pressure.

Further, Cameron only marketed the clamp to knowledgeable users; this is not a product that is available to users outside the oil and gas industry. Vetco was clearly a knowledgeable user. In fact, Vetco is Cameron's main competitor in the oilfield clamp business. A more explicit warning was not necessary. No reasonable jury could find that the cause of this accident was a failure to warn. Vetco, who set up the test assembly and decided on the amount of pressure to be applied, already knew or should have known of the dangers of using a clamp, such as this one, regularly at a rate one and one half times its rated working pressure. A manufacturer is not required to warn a sophisticated or knowledgeable user of dangers of which they are or should be aware. *Scott v. White Trucks*, 699 F.2d 714 (5th Cir. 1983); *Bradco Oil & Gas Co. v. Youngstown Sheet & Tube Co.*, 532 F.2d 501 (5th Cir. 1976). Thus, we find that there was no failure to warn by Cameron.

Similarly, we find that the clamp was being misused. A manufacturer is entitled to assume that its product will not be put to extraordinary uses or unreasonably misused. *Christofferson v. Haliburton Co.*, 617 F.2d 403 (5th Cir. 1980). Although, it is common in the oilfield to test equipment at one and one half times its rated working pressure, it is not proper or reasonably expected for equipment to be used regularly at pressures above its rated working pressure. Testimony was offered that the clamp had been used in tests of 15,000 psi repeatedly since it had been at Vetco's Broussard yard. However, on each occasion the clamp was not the subject of the test, it was merely part of the test assembly. This constituted a serious misuse of the clamp. In designing tests to 15,000 psi, a clamp with a rated working pressure of 15,000 psi could have and should have been used.

Third, we find that the clamp had been substantially altered since the date of its manufacture. The clamp was not new. The only evidence we have to determine when it was manufactured is from its markings. Each clamp half was marked with a small inspectors stamp which indicated that it was manufactured at Cameron's Oklahoma City plant. The Oklahoma City plant only manufactured the 10,000 psi #27 clamp from 1974 through 1976. Examination of the clamp also revealed that three of the bolts on the clamp were not the type bolts the clamp came with originally. The two bolts which stripped out were apparently Cameron bolts for a different size Cameron clamp. These bolts had been "turned down" or machined to fit in this clamp. These bolts were shorter than the bolts the clamp was designed to use. The result from using shorter bolts was that thread engagement was considerably lessened and the strength of the connection and ultimately the clamp was greatly reduced.

A "manufacturer is under no duty 'to make a product that will last forever or will withstand abuse or lack of maintenance' or that is 'foolproof,' nor one whose component 'parts do not wear out' ". *Scott* at 717 (citations omitted). "Lapse of time, inadequate 'accounting' for use between manufacture and accident, and alterations and repairs by persons other than the manufacturer will tend to negate the inference of defect existing at the time of manufacture." *Norris v. Bell Helicopter Textron*, 495 So.2d 976, 978 (La. App. 3d Cir. 1986). In this case no one knew what kind of use the clamp had been subjected to, nor where it had been used prior to its arrival at the Broussard facility. Additionally, no one knew when or how the altered bolts came to be on the clamp. These changes as well as the repeated misuse of the product substantially reduced the safety factors and efficiency of the clamp as it was manufactured and were factors in the accident. The con-

dition of the clamp at the time of the accident was not the same as it was when it left the manufacturer's control.

We find that plaintiff failed to make a showing concerning essential elements of her case and that there is no genuine issue as to material fact upon which a jury could properly proceed to find a verdict for the plaintiff. Defendant Cameron therefore is entitled to a directed verdict as a matter of law and judgment will be entered in Cameron's favor and against plaintiff Lavergne, dismissing plaintiff's claims with prejudice.

DONE AND SIGNED at Alexandria, Louisiana, this 2d day of May, 1990.

/s/ Nauman S. Scott
UNITED STATES DISTRICT JUDGE

COPY SENT

DATE 5-2-90
BY PA
TO: Johnson
Bott/Murphy
Ayo/Fontana
Cobb
Raymond